IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF DELAWARE

- - -

IN RE:		
NORTEL NETWORKS INC., et al.,	:	Chapter 11
	:	
	:	Case No . 09-10138-KG
Debtors.	:	
		Jointly Administered
JOINT ADMINISTRATORS,	:	CIVIL ACTION
	:	
Appellant,	:	
v	:	
	:	
NORTEL NETWORKS INC., et al.,	:	
	:	NO. 13-757-LPS
Appellee.		

- - -

Wilmington, Delaware
Tuesday, July 19, 2013
Telephone Conference

- - -

BEFORE: HONORABLE **LEONARD P. STARK**, U.S.D.C.J.

- - -

APPEARANCES:

YOUNG CONAWAY STARGATT & TAYLOR, LLP
BY: EDWIN J. HARRON, ESQ.,
JOHN T. DORSEY, ESQ., and
JAIME LUTON CHAPMAN, ESQ.

and

HUGHES HUBBARD & REED, LLP
BY: DEREK J.T. ADLER, ESQ.
(New York, New York)

and

APPEARANCES: (Continued)

HERBERT SMITH FREEHILLS, LLP
BY: JOHN WHITEOAK, ESQ.
(London, England)

Counsel for Appellant

MORRIS NICHOLS ARSHT & TUNNELL, LLP
BY: DEREK C. ABBOTT, ESQ., and
ANN C. CORDO, ESQ.

and

CLEARY GOTTLIEB STEEN & HAMILTON, LLP
BY: JAMES L. BROMLEY, ESQ.
(New York, New York)

Counsel for Appellees

RICHARDS LAYTON & FINGER, P.A.
BY: CHRISTOPHER M. SAMIS, ESQ.

and

AKIN GUMP STRAUSS HAUER & FELD, LLP
BY: FRED S. HODARA, ESQ.,
ABID QURESHI, ESQ., and
DAVID H. BOTTER, ESQ.
(New York, New York)

Counsel for the Committee
of Unsecured Creditors

- oOo -

P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in chambers, beginning at 3:32 p.m.)

THE COURT: Good afternoon, everybody. This is Judge Stark. Who is there, please?

MR. DORSEY: Good afternoon, Your Honor. It's John Dorsey at Young Conaway Stargatt & Taylor on behalf of the appellants. I have Ed Harron and Jaime Chapman with me in my office; and there are also some other folks on behalf of the appellants, including our lead counsel, Derek Adler with Hughes Hubbard, and I believe he has folks with him in his office. We also have John Whiteoak of Herbert Smith Freehills joining us from London and Dan Lindell of Ernst & Young is one of the Joint Administrators.

THE COURT: Okay. Thank you. And who will be speaking on behalf of the appellants?

MR. DORSEY: Mr. Adler, Your Honor.

THE COURT: Okay. Thank you.

MR. ABBOTT: And, Your Honor, this is Derek Abbott from Morris Nichols. On the phone with me is Ann Cordo from my office as well as Jim Bromley and a number of his colleagues from the Cleary Gottlieb firm. Mr. Bromley will be handling the argument for the debtors, Your Honor.

THE COURT: All right.

MR. HODARA: Your Honor, along with the debtors, for the Official Committee of Unsecured Creditor, Akin Gump; and from Akin Gump, myself, Fred Hodara; Abid Qureshi, and David Botter.

MR. SAMISS: Your Honor, also for the Official Committee of Unsecured Creditors, this is Chris Samiss from Richards, Layton & Finger.

THE COURT: Okay. Thank you. Anybody else?

MR. BERKOW: Your Honor, this is Joseph Berkow of Allen & Overy on behalf of the minder, the Canada Debtors in the Canada proceedings. We are not a party to the appeal. We have simply dialled in as an observer only.

THE COURT: That's fine. Thank you.

I have my court reporter here with me. For the record, it is our case of Joint Administrators versus Nortel Networks Inc. et al, Civil Action No. 13-757-LPS. We have pending before us the Joint Administrators' motion for leave to pursue the appeal, and I set this call in order to hear more about that pending motion. So let me hear first from the moving party, the Joint Administrators, please.

MR. ADLER: Good afternoon, Your Honor. This is Derek Adler from Hughes Hubbard. Thank you for giving us an opportunity to address this with you.

Could I inquire, would it be useful to go through the full background of this or has Your Honor had an opportunity to review at least that aspect of the papers?

THE COURT: I think it was well set out by you all. I have reviewed the papers so we can dispense for now with the background. If I need further background, I'll let

you know.

MR. ADLER: All right. Then as your Honor knows, the appeals that we're dealing with here come from a decision by Judge Gross entered back in April which had two aspects:

There was a denial of our motion to compel arbitration of the dispute between the different international Nortel estates over how to allocate the $7.5 billion of proceeds that is awaiting distribution in escrow in New York.

Then there was the other part of his decision which ordered that the allocation dispute would be tried in a unique and unprecedented cross-border trial, a simultaneous trial by video between the Delaware Bankruptcy Court and the Ontario Insolvency Judge, Commercial Judge, and that would also be done in conjunction with a trial of the claims that are asserted between the two estates as well.

So the status of the appeal of the motion to compel arbitration, we do have a right to appeal that as of right. The Third Circuit has accepted that for direct appeal, and we just got a decision two days ago that has granted a joint motion of the parties to handle that on an expedited basis. So the arbitration piece will be briefed between now and September 5th, and presumably the Court will schedule oral argument soon thereafter.

The basis for the current appeal is we're seeking leave from the part of the order that directed that

the trial of the allocation dispute be done in a joint cross-border trial. We say that the parties didn't agree to this. We say that the U.S. Court, the Bankruptcy Court doesn't have authority to go and create hybrid rules of procedure, rules of evidence and so on to apply in such a joint trial. We say certainly -- and I think this is not disputed -- that the U.S. judge doesn't have the right to form a panel and deliberate together with a judge in Ontario. I think that is conceded. But the procedures that have been put into effect create a very strong risk of that.

But, most importantly, the procedure that has been put into place doesn't meet the most basic requirement of due process because it doesn't lead to a single binding judgment that will resolve the dispute over how to allocate the $7.5 billion.

THE COURT: Let me interrupt you there, Mr. Adler. Let me interrupt you there.

So did you try to get certification of an appeal from the interim allocation order in the Third Circuit?

MR. ADLER: Yes. We had asked the Third Circuit to take that aspect of it at the same time. There was a motion to certify. That was made originally by the U.S. Debtor. We joined that but said can we also make it clear that you would take that aspect of it as well? And the Third Circuit denied that. So that aspect of this is still

in front of Your Honor.

THE COURT: Right. So my question is, your motion for leave, doesn't it present to me the very same issue that was presented to the Third Circuit and denied by them?

MR. ADLER: It wasn't briefed in the same manner. I think that the question of how they came out on that isn't preclusive of Your Honor on that point. It was just they essentially didn't disturb Your Honor's jurisdiction over that aspect of the motion for leave to appeal.

THE COURT: Okay. Let's assume that I have the discretion to decide differently than they did. Why should I decide differently? Fundamentally, why should I involve myself in this court right now in an interlocutory appeal from a preliminary interim order?

MR. ADLER: Because as we laid out in our papers, this does present a very clear case for leave under the criteria that the courts typically apply in this case. The issues are extremely important to the creditors of Nortel here and around the world. They've been waiting a long time for this money to be distributed to the various creditors, and the procedures that we're going down here plainly will not lead to a resolution of that. It results in a deadlock between two judgments with no way to resolve

it. So it is quite important.

It is a case of first impression. There is no instance where a joint cross-border trial has been conducted. The procedures that have been done between Bankruptcy courts have typically been to handle various administrative matters, approving sales, approving various other coordination functions, but there has never been a joint trial of what is in effect an adversary proceeding, particularly in a context where you have got the U.S. Court against the Canadian Court in a situation where the Canadian Debtor is claiming the majority of the $7.5 billion, the U.S. Debtor is claiming the majority of the $7.5 billion and the two judges effectively have to decide which of their respective Debtors is going to get the lion's share of that money.

So it's a very unique situation with a controlling question of law whether this can happen and certainly a substantial ground for difference of opinion. An immediate appeal will materially advance the ultimate determination. It will get us on a track where we're not going to be headed towards this dual judgment deadlock that we're headed towards at the moment.

THE COURT: Well, you have said a lot of things about the dual judgment deadlock. I think a moment ago you said, absolutely, that is where we're going to end up, basically not allowing for any possibility that we could

avoid that under the interim allocation order. Now you are saying maybe it's a possibility. I thought from the papers you were saying maybe it's a possibility.

Help me figure out your position. Are you saying if I don't get involved and I let things play out according to the order that is in place, there is just no way, there is no chance whatsoever we're going to end up with judgments that are enforceable and consistent with one another?

MR. ADLER: I can't say that we can't exclude the possibility, but it's really extremely unlikely. The nature of the dispute here requires the two Courts to look at nine separate sales of assets, of global businesses of Nortel or actually eight sales of businesses and one sale which was the sale of the residual IP, just residual intellectual property and not a functioning business. The Court will have to look at each of those sales and look at the entitlement of up to 40 separate entities around the world, each of them, to the proceeds of each of these nine separate transactions. There is actually over 100 individual decisions with dollar amounts attached to them that the Courts will have to decide as far as who gets how much from each of these sales.

First of all, we all have to hope and pray that they come out the same way on each of these hundreds of

different decisions or they have to get to that, applying their own choice of law rules and so on. And then after that, there are the two separate appeal processes which go on through the two different court systems. This has been a hotly contested case. I think we have to unfortunately anticipate there may be appeals, and that will continue to take the two judgments off in separate directions. So it seems to me that it's extremely unlikely is what I would say that they will come out the same.

But, in addition, we're engaged in a purported judicial process that isn't designed to lead to a single binding judgment. I only say that is a fundamental defect in due process.

THE COURT: What about the subsequent order entered by Judge Gross I believe in May? You're attempted appeal is from an order in April. Doesn't the May 1st order make any issue relating to the April order moot?

MR. ADLER: It doesn't. The salient features that we challenge on this appeal are all present in the April order. The April order granted the motion by the U.S. Debtor to hold a joint trial, to have this procedure that I have just described. Subsequent orders don't supersede that order, and they don't modify any of the features I have just described of having the two judgments, of being in a situation where there will need to be a joint trial under

who knows what rules of evidence and procedure. They're essentially scheduling orders and other administrative matters with the conduct of the case between now and next January when the trial is scheduled to begin.

THE COURT: What is the status of the proceedings in front of Judge Gross? Are they stayed pending the appeal or are they ongoing and heading toward the trial that he scheduled?

MR. ADLER: They're ongoing and heading towards the trial that he has scheduled. We moved for a stay of those proceedings. In the Third Circuit, there is controlling case law that says that where you appeal from a denial of a motion to compel arbitration that the proceedings below are automatically stayed until the appeal is decided unless the judge finds that the appeal is frivolous.

There is a decision that was entered. The U.S. Debtor resisted our motion for stay. They argued our appeal was frivolous. And Judge Gross found that. Essentially he said he wanted the proceedings to go forward. He wanted discovery and so on to go forward and found that the case is frivolous, that the appeal of his own order is frivolous.

Now, that is something that we had -- we obviously don't agree with that. We actually don't object to proceeding with the pleadings on allocation and discovery on allocation because all of the work we're doing on that

will be usable whether the eventual decider of this is a court or a panel of arbitrators. So we don't, for reasons of efficiency, we don't object to getting through these, you know, doing discovery and so on. So that is done.

We have offered to stipulate that with the U.S. debtor and the other parties but instead there is an order now in which Judge Gross has denied a stay.

Now, we had anticipated. As you know, we moved for expedited treatment in the Third Circuit. We had hoped that would get acted on sooner. Looking at the schedule on the basis of the decision that was entered in the briefing schedule that was entered two days ago, there is really now a pretty strong risk that there won't be a decision from the Third Circuit on the arbitration question before the January 6th trial date. So for that reason, we will be making a motion for a stay before Your Honor that is separate from the motion for leave that is before you now.

THE COURT: All right. Obviously, I don't have that motion in front of me so I'm not saying anything about that, and I'm not taking any position today on whether the appeal you have pending as of right in the Third Circuit is frivolous or not. So I don't mean for you to read anything into my question.

But my question is you could prevail in the Third Circuit on your appeal, which, if you do, as I

understand it, would mean that you would be in front of an arbitrator and any issue that might be pending in front of me relating to your requested appeal we're talking about now and the allocation order, that would all be mooted by a decision that this matter really should be with arbitrators. Am I right about that?

MR. ADLER: You are right about that, Your Honor. Under the circumstances, though, we don't think we can wait for the Third Circuit decision to come down before addressing this. Obviously, we had hoped to have the two aspects of the appeal before the same reviewing court at the same time. It hasn't played out that way, but because of the seriousness of the issues and the importance of the issues, we do believe the appropriate approach is still for you to address our motion on the protocol aspect separately.

THE COURT: Thank you. That is helpful. I will give you a chance for rebuttal, but I want to at this time turn it over to the other Debtors to go ahead and say what they would like.

MR. BROMLEY: Thank you, Your Honor. This is James Bromley of Cleary Gottlieb. We're counsel to Nortel Networks Incorporated and the other U.S. Debtors in the cases before Judge Gross and now in these appeals before Your Honor.

The question we think is a relatively narrow

here. Interlocutory appeals are exceptional. They're to be used sparingly and only in very unique situations. We don't think any of those circumstances exist in this case to justify an interlocutory appeal of what is a procedural decision. Indeed, I will get to the point of mootness with respect to the actual order that is the subject of this motion.

When we're stepping back and looking at the situation here, for most of the time that we have been dealing with this motion for leave, we have also been talking at the same time about the EMEA Joint Administrators' appeal to the Third Circuit.

The appeal to the Third Circuit is not the only appeal that goings on however, Your Honor. There has been a simultaneous appeal by the EMEA Joint Administrators in Canada of similar orders which somewhat belies the concerns of the Joint Administrators have raised about the inability of the courts to cooperate and the problems that simultaneous appeals might present.

There was a motion for leave to appeal made to the Canadian Ontario Court of Appeal, and there is no appeal as of right as to the cross-motion with respect to arbitration. The Canadian Ontario Court of Appeal has denied that motion for leave, as we updated the Court in a letter about a month ago. And there has been no further

activity in Canada by the Joint Administrators.

So what we have on the issue of arbitration is a fairly strong set of decisions. We have decisions from Judge Gross and Justice Morawitz at the trial level, both strongly stating that there was no agreement to arbitrate, and that the jurisdiction with respect to the Joint Administrators of both Courts for a trial was voluntary. Voluntary submission to jurisdiction by the Joint Administrators over a very long period of time. We're nearly at the fifth anniversary of the commencement of these proceedings. And,

The Administrators have happily participated in literally in dozens of cross-border hearings, and they're not simply administrative hearings as Mr. Adler said. They are, and have been, hearings that have been hotly contested, including the hearing that led to the orders that are the subject of this motion for leave as well as the appeal to the Third Circuit.

So not only did Justice Morawitz and Judge Gross find in separate reasons, separately reasoned orders and separately entered orders that were issued after a joint hearing, that there was no agreement to arbitrate, Judge Gross separately found that the appeal to the Third Circuit was frivolous, and in so doing, retained jurisdiction over all discovery matters.

That decision was issued on May 7th, 73 days

ago, and not once during that period of time have the Joint Administrators moved for a stay.

We're happy that the Third Circuit has granted our motion, our joint motion for expedition but we believe the Third Circuit will have ample time to reach a decision on whether or not there was an agreement to arbitrate and to do so before the scheduled hearing of January 2014.

Indeed, the Courts entered the schedule that the parties collectively and cooperatively submitted to the Third Circuit, and so we will be fully briefed by early September. And we believe with respect to the issue that is before the Third Circuit on arbitration that it will be very easy for the Courts to find that Judge Gross was correct the first time as well as with respect to his order finding that the appeal was frivolous.

When we're talking about the standards for an interlocutory appeal, the question really boils down to is whether or not the standards for granting that exceptional relief are met in this case. And I think, respectfully, the answer to that is no, and a resounding no.

The first issue is whether or not there is a controlling question of law. And the question of law that Mr. Adler has described today I would summarize as saying there is no chance there will be a single binding order entered.

Well, we are before two Courts. There will be two orders entered. That is the way that every one of these sales was conducted. There were separate orders entered after evidentiary hearings that were held by video conference before both Courts with the full and active participation of the Joint Administrators.

In every one of those circumstances, some of the most sophisticated participants in the world economy committed $7 and-a-half billion to purchase assets from the Nortel Debtors in reliance on orders issued by the U.S. and Canadian Courts separately after joint hearings.

So the idea that this has never happened or it is unprecedented simply belied by the record in this case and by the docket of the Delaware Bankruptcy Court that shows that over and over and over with respect to non-administrative matters but rather highly substantive matters, joint hearings were held, separate orders were issued and substantial commitments were made and substantial payments were made.

The single binding order language that Mr. Adler uses is really a plea for a granting of the motion to compel arbitration. Mr. Adler and his clients want there to be an arbitration. In that context, there would be a single order. But we have had both Courts, in the U.S. and Canada, as well as the Canadian Ontario Court of Appeal say in very definitive language that there was no agreement to arbitrate.

Even if the U.S. Court were to find at the Third Circuit that there was an agreement to arbitrate, the fact that the Canadian Court of Appeal has found that there was not would destroy the ability to have this arbitration that Mr. Adler believes should take place.

It is very I think frustrating for the Creditors as well as the Debtors in these cases to be continuing to fight over this forum issue. Mr. Adler says the folks have been waiting for a very long time for distributions, and that is true. But there has been as clear statements as possible from the Courts who have reviewed this already that there is no agreement to arbitrate. And that is the only way that there would be a single binding order.

Now, failing that, what we would have is exactly what we have had in this particular matter, which is a contested hearing that was held by video conference simultaneously in Toronto and in Wilmington that led to the issuance of separate orders. Justice Morawitz's order denying the motion for arbitration and Judge Gross's denying the cross-motion for arbitration were separate orders. And the orders approving the allocation protocol issued by the Canadian Court and the U.S. Court were separate orders, and those separate orders were appealed separately in each of the two jurisdictions.

There has been no catastrophe. There has been no halt to any of the process. All of the parade of

horribles that Mr. Adler sets out have failed to manifest themselves in the very manner that we are discussing today.

So when we talk about a controlling issue of law that should take us out of the typical rule, which is that interlocutory appeals should not be addressed, the question is what is the question of law? And as far as we can tell, Mr. Adler's argument is that due process would not be served by having such joint hearings and having separate orders. But, again, that isn't a question of law, that is a question of process.

When we look at the next question, whether or not there is a substantial ground for a difference of opinion as to the controlling question of law, the Joint Administrators focus first that this is an issue of first impression. And we vehemently disagree with that. Not only are cross-border protocols endorsed widely in the insolvency field, the cross-border protocols between U.S. and Canadian courts are the model for court-to-court cooperation around the world. And,

In this particular case, these Joint Administrators have been full and active participants in multiple cross-border hearings. It is only because, in this particular circumstance, that they want arbitration that they have raised for the first time, after nearly five years, the concern that none of this can work. But the fact

that we're having an argument about $7 and-a-half billion is proof that it does work.

The next factor to take into account is whether an immediate appeal from the interlocutory order would materially advance the ultimate determination of this litigation. And the answer to that is simply no. It would complicate it, not advance it.

The Third Circuit has addressed the question whether or not this cross motion should be addressed now, and their answer was not. We believe that that is dispositive.

The Third Circuit has also said we would accept the direct appeal. We will schedule the argument and briefing on the direct appeal on an expedited basis. We believe strongly that the Third Circuit will act quickly on this. And the basis for that belief is not simply the orders that have been entered in this particular dispute, but this is not the first time that the Nortel Debtors have been before the Third Circuit.

The Third Circuit spoke in a decision two and-a-half years ago with respect to a question of whether or not certain U.K. Pension Creditors should be able to litigate their claim against the U.S. Debtors in the United States or before the Courts, an administrative tribunal in the United Kingdom. The Third Circuit said very clearly in that circumstance, no. They needed to do it in the United

States before Judge Gross in the Bankruptcy Court for the District of Delaware.

There are two things we can take from that exercise. First, we argued that in September we had a decision in December. If that schedule kept in this circumstance, we would have a decision before the trial is scheduled to talk place.

There, that is without expedition. A request to the Third Circuit was made in that circumstance, and it was denied. Notwithstanding the denial of expedition, we had a time frame that the Third Circuit followed, well known for their efficiency. I have full confidence they will do the same here, particularly having granted the motions to expedite, having taken the direct appeal and having denied this very motion made to them directly by the Joint Administrators.

In addition, Your Honor, the Third Circuit ended their decision with respect to the U.K. Pension Administrators with an admonition to the professionals in these cases that it was critical that the parties proceed and proceed promptly to an ultimate resolution and distribution of these funds. We believe that they recall that statement, and we believe that they will make that statement again in spades with respect to this appeal.

So from our prospective, Your Honor, the Debtors

strictly believe that this is an attempt to relitigate the denial of the motion, to compel arbitration. We believe that the motion for leave today relates simply to a procedural exercise. This is no different than any other procedural exercise that takes place in advance of trial.

If there are issues to be appealed after trial, the Joint Administrators will have ample opportunity to do so. But what they want to do with this motion for leave is to completely derail this exercise. And,

With the appeal with respect to the denial of the motion, the cross-motion to compel arbitration before the Third Circuit, it is very likely that by September, this will all be rendered moot when the Third Circuit makes its decision.

Your Honor, that is all the Debtors have to say. I think the Creditors Committee might have some points to make as well, but I'm also happy to take any questions you may have.

THE COURT: No, thank you very much. Did the Committee wish to be heard from?

MR. BOTTER: Your Honor, it's David Botter from Akin Gump. Just very briefly. I would join with Mr. Bromley's statements, and I would only respond to one statement by Mr. Adler at the outset of his discussion.

One of his first points was that it was

important to the Creditors of Nortel that this issue be decided, be decided promptly.

I wanted to note for the Court, as the Court I'm sure is aware, that we have been joint movants with the Debtors throughout this process in pursuing the direction and the dual court determination. We are the statutory representative of all U.S. Creditors in these cases and, frankly, we think that this is the best and most expeditious process. And, again, I join in all the statements of Mr. Bromley.

Thank you, Your Honor.

THE COURT: Okay. Thank you very much.

Mr. Adler, you can respond, if you wish.

MR. ADLER: Yes. Thank you. Just a couple of points.

Mr. Bromley referred to the fact there have been many previous joint hearings in this very case and, of course, in various other bankruptcy cases.

That is certainly true, but the nature of what is being presented here is completely different from anything else that has ever been litigated in any cross-border hearing we've heard of in any case.

You referred, for example, to the prior motions that were made to approve the sales initially for the bidding processes and subsequently for the actual sales

which were presented in joint hearings before the U.S. and Canadian Courts, and the nature of that is each Court is being asked to approve or disapprove of the sale in relation to the approval of their particular Debtor. There is no overlap of the subject matter. Each of them is making a decision as to whether the -- in the case of the U.S. Court, the U.S. Debtor should proceed with the sale. In the case of the Canadian Debtor, the Canadian Debtor should proceed with the sale. They're not seized of the same subject matter. And,

To the extent there is possibility of reaching inconsistent decisions, if one of the Judges, for example, held, found that the stalking horse bid was not sufficient, something like that, that there would be a disapproval, the thing could be renegotiated and re-presented, but it would not leave us in a deadlock situation. It would simply be an inability to proceed with a particular transaction. In that sense, the Bankruptcy Judges are exercising their supervisory power really over transactions of the individual debtors under their control.

What is presented here in the allocation dispute is something we have said should properly be done in an adversary proceeding because it's really a lawsuit. It's not approval of a schedule or a claims process or a plan of reorganization or any of the other things that Bankruptcy

Judges do in their administrative capacity. The two Judges are sitting as Trial Judges, litigating claims, hotly contested claims in relation to the same risk, the same subject matter where the dispute is actually between their two respective Debtors over whom they exercise jurisdiction, so it's a completely different nature.

In addition, it is a feature of our cross-border protocol. I think all cross-border protocols, that it gives the judges the right and indeed the obligation to consider whether particular disputes should properly be decided by one judge rather than both judges in joint hearings. This is explicit in our cross-border protocol that the judges have the jurisdiction to consider and to allocate responsibility for particular matters to one of them or the other of them. That is what we asked for here.

Mr. Bromley has suggested that the only way to get to a single binding judgment here is through arbitration. But what we actually said to Judge Gross is, at the conclusion of our argument, please don't take us down this experiment, into this experiment to see if, by happenstance, you and the two judges reach of the same decision. If you find this dispute is not subject to mandatory arbitration, choose one of you to litigate it. Decide whether one of you should litigate it.

Because at heart what is presented here is

actually a classic case of parallel proceedings pending in two different jurisdictions where the two courts are seized of the same subject matter, and there is a well developed body of law that tells judges what to do in that situation.

There are times when one judge might decide to enjoin the proceedings in the other jurisdiction. There are times when one judge might decide to stay his proceedings in favor of the proceedings in the other jurisdiction. And,

Then the alternative to that, there is so-called race to judgment where the two courts simply proceed to their separate judgments, but the advantage of that is that the traditional rule is that the first judgment wins. The first judgment by one court seized of the same subject matter is given preclusive effect and makes the matter res judicata in the second court, assuming there is no gross procedural defect. And,

What has happened here is the judges have intensionally created a situation where that rule, the first judgment rule, is defeated because the two judgments it appears will come out simultaneously. So what we're looking at is a situation where there will be no way, and we really will be in a materially worse situation once the two judgments have been entered.

The comity issues and the other issues that will be raised on appeal will be much more difficult, if it

is a question of whether to favor the U.S. judgment over a conflicting Canadian judgment and so on. So I think that covers it.

Far from wanting to derail the process, we have been saying it can be done in an expeditious manner. We do the discovery now and instead of having a trial in January, having an arbitration in January. Arbitration can be done as quickly as a trial. The procedures would be similar but you would have a panel of three arbitrators that would decide the thing. There isn't a chance of a deadlock where you have one of them issuing one award.

In addition, alternatively, if this goes through the process by which one of the judges decides it, that would also be an approach that leads to one binding judgment. We are the ones that are going to provide the way out of the deadlock, something that is going to tie up the Creditors for years if it isn't addressed now.

I think, unless Your Honor has any further questions, that is all I have to say.

THE COURT: No, thank you. Your arguments have answered my questions, and I find that I am in a position to make a decision on the motion.

I had carefully reviewed all of what you had submitted prior to the call today, and the arguments today have been helpful. And as I say, the questions I have had

have been answered.

So with that, my decision on the Joint Administrators' motion for leave to file an interlocutory appeal relating to the allocation protocol order, my ruling is that the motion for leave is denied. I want to explain why.

First, I've considered, of course, the three factors that go into a decision as to whether or not an interlocutory appeal is warranted. In my view, those three factors are not satisfied here, and that is basically for reasons that have been articulated by the Debtors in the papers and then to some degree reiterated on the call today. I'm not going to linger too much on those specific three factors because my decision turns really even more so than just the failure to satisfy the three factors.

On the next step of the analysis, which is even if I did think the three factors were satisfied, I then have what amounts to I believe essentially a discretionary decision as to whether or not the circumstances justifies what is truly a departure from the very strong procedural norm that appeals only take place after the completion of proceedings; that is, take place from a final judgment and not from an interlocutory appeal.

Here, even if the three factors were satisfied, and they're not, I would still find not a proper basis or

not a basis in which I would permit the interlocutory appeal to proceed. So let me touch on some of those circumstances.

First, it does seem to me that the Third Circuit has already made a decision on essentially the same issue. The request to the Third Circuit to take up an appeal from the allocation order at the same time that it was taking up the appeal on the arbitration issue, that request of the Third Circuit seems to me is materially the same request that is now in front of me. The Third Circuit denied that request; and I don't see a reason for me to come out differently than that.

Additionally, I think that there is a pretty good argument that the appeal that the Joint Administrators wish to press in front of me at this time is moot because it's an appeal from an interim order issued by Judge Gross I believe in April, and he has subsequently issued an order I believe in May, and there is no appeal or even request for an appeal from that subsequent May issue.

As important as all of that is that even assuming the appeal is not moot, it seems to me that that allocation order in April is a preliminary procedural order. It is an order that contemplates quite a great deal of additional process culminating in a trial, and I don't think the circumstances warrant an appeal when there is that much process still to occur in the Bankruptcy Court.

Further, I'm very mindful that all of this is occurring in the context of a very large, very complex, multinational proceeding. It seems to me that to this point, the Bankruptcy Court in the U.S. and the counterpart Court in Canada have been ably handling this complex situation and the Third Circuit very importantly is, of course, on an expedited basis looking at a central piece of the parties' dispute; namely, the arbitration issue. If the Joint Administrators are right that the parties have actually agreed to arbitrate, then anything that I might do otherwise in connection with an appeal on the allocation protocol would instantly become moot and the efforts that the parties and the Court would put into reviewing the procedures would be wasted because all of this would end up ultimately with an arbitrator and there would be no need for me to tell the Bankruptcy Court how it should proceed or not proceed.

I'm also mindful that the Creditors have weighed in and that they believe the appropriate way of proceeding is the manner which has been set upon by the Bankruptcy Court in the allocation protocol. And,

A final factor that weighs in my discretion and would cause me to not take this interlocutory appeal again even if the three criteria were satisfied is I think my decision today is consistent with at least the spirit of Judge Sloviter's comments at the end of the opinion in

relation to an earlier appeal arising from this bankruptcy, the appeal that was alluded to on the call today.

Fundamentally, therefore, I just don't think that it will materially advance the termination of this litigation, and I don't think that it would be under the circumstances the best exercise of my discretion for me and this court to get involved in the middle of the allocation proceeding, which is what the Joint Administrators are asking the court to do.

In saying all that, and ruling that way, I recognize that there are risks in my decision. In deferring an appeal until after a final judgment, assuming, of course, that the case stays in the Bankruptcy Court and doesn't go to arbitration -- in deferring the appeal to final judgment, it could be there is some risk that ultimately I or another appellate body will decide that the Joint Administrators were right all along. This was inconsistent with due process or in some other way was fundamentally flawed and, therefore, it has to be done over again. I recognize that is a risk. That is a risk inherent in the final judgment rule.

Alternatively, however, it may be that the appeal from a final record, from a concrete record may turn out to be much easier to resolve than one in the unsettled preliminary interlocutory circumstances that we face today.

So, in any event, for all of those reasons, my decision is to deny the motion for leave to file an interlocutory appeal. I will get a written order out to that effect but the analysis is what I have just attempted to articulate to you today.

Are there any questions about what I have ruled, Mr. Adler?

MR. ADLER: No. Thank you, Your Honor. I think we understand your ruling.

THE COURT: Okay. And Mr. Bromley?

MR. BOTTER: No questions, Your Honor. Thank you very much.

THE COURT: And for the Committee, are there any questions?

MR. BOTTER: No. Thank you, Your Honor.

THE COURT: Thank you all very much for your time. Have a nice weekend. Good-bye.

(Telephone conference ends at 4:57 p.m.)

I hereby certify the foregoing is a true and accurate transcript from my stenographic notes in the proceeding.

/s/ Brian P. Gaffigan
Official Court Reporter
U.S. District Court